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No. 681

In the Supreme Court of the United States

OCTOBER TERM, 1960

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

MOTION TO ADVANCE

ARCHIBALD COX,
Solicitor General, Department of Justice, Washington 25, D.C.

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General Counsel, Interstate Commerce Commission, Washington 25, D.C.

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Pursuant to Rule 43(4), the United States and the Interstate Commerce Commission, appellees, respectfully move that, in the event probable jurisdiction is noted, this case be advanced for hearing and decision during this Term of Court.

1. This is an appeal, filed January 9, 1961, from a decision of a three-judge district court affirming an order of the Commission. That order held that Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. 5(2)(f), does not require, as a condition to approval of a railroad merger, that all affected employees be maintained in their present, or an equivalent, job status for the protective period prescribed by that section. The jurisdictional statement was

filed on January 27, 1961, and all of the appellees, including the Erie-Lackawanna Railroad, have waived the right to file motions to affirm in the interest of expedition of the case.

2. The decision below raises a significant issue as to the interpretation of the job protection provisions written into the Interstate Commerce Act by the Transportation Act of 1940. The early resolution of this question by this Court is highly desirable in order to end uncertainty and to clarify the circumstances under which the unification of rail systems in accordance with Congressional policy may take place. In addition to the present case, there are now pending before the Commission, at various stages of development, at least six other major railroad transactions falling within Section 5 of the Act. Most, if not all, of these cases will raise the issue presented here. Appropriate action in these proceedings can be materially advanced by early determination of the instant case.

3. Apart from the bearing of this case on other pending proceedings, there is a substantial public interest in the earliest possible resolution of the instant controversy. As we pointed out in our memorandum of January 12, 1961, opposing a stay of the Commission's decision pending the Court's consideration of this appeal:[1]

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[1] That motion was denied by the Court (three Justices dissenting) on January 23, 1961, without prejudice to its renewal upon the prompt docketing of the appeal. A renewed motion, which we are opposing (see Memorandum for the United States and the Interstate Commerce Commission in Opposition to Motion for Stay, filed February 6, 1961) is now pending.

> * * * we think it is manifest that in this situation some degree of irreparable injury is unavoidable whichever disposition is made of the motion for stay. On the one hand, it is clear that any postponement of the consolidation, insofar as it would achieve elimination of overlapping and uneconomical facilities and jobs, would necessarily result in loss to the railroad and thus further impair its present precarious financial situation. On the other hand, dismissals, demotions, or transfers of employees during the pendency of the appeal, even though the affected employees are given financial protection under the "New Orleans conditions" included in the Commission's order, would necessarily result in intangible but nonetheless very real injury.

It seems clear that, regardless of the Court's action on the application for a stay, both the employees and the carrier will continue to be subject to unsettling uncertainty until the matter is finally resolved. Even if a stay were granted, the employees' future would remain clouded and unsettled pending a decision on the merits. On the other hand, as the carrier has pointed out in its memorandum of February 3, 1961, even if a stay is denied, progress in consummating the merger will inevitably be delayed so long as the litigation continues.

Any delay in consummating the merger would have serious public consequences apart from the effects upon the private interests of the employees and the carrier. The Erie and the Lackawanna Railroads separately, and the merged railroad operating as an entity under the approved plan, perform vital trans-

portation functions essential to the well-being of important areas of the northeastern part of the country. These railroads, at the time of the Commission's consideration of the merger, were operating at substantial deficits; these deficits are continuing.[1] The public interest in efficient and economical railway service and in the sound economic condition of carriers, expressed in the National Transportation Policy (49 U.S.C. preceding § 1), strongly supports the view that there should be an early resolution of the present controversy so that the merger, the public benefits of which are not disputed, may be fully effectuated.

Accordingly, the government urges that, if probable jurisdiction is noted in the instant appeal, the case be advanced on the calendar for hearing at this Term.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROBERT W. GINNANE,
General Counsel, Interstate Commerce Commission.

FEBRUARY 1961.

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[1] See the carrier's memorandum of February 3, 1961, p. 6.

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